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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 476

GOLDIE B. PRASHKER, Executrix of the Estate of Nathan Prashker, deceased, and CHOICE EMBROIDERY & LACES, INC., *Petitioners,*

v.

BEECH AIRCRAFT CORPORATION and ATLANTIC AVIATION CORPORATION, *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BY JEAN C. CLEMINSHAW, INDIVIDUALLY, AND AS WIDOW OF JAMES M. CLEMINSHAW, AND AS TRUSTEE AD LITEM FOR ALL PERSONS ENTITLED TO SHARE IN THE ESTATE OF JAMES M. CLEMINSHAW, DECEASED

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Jean C. Cleminshaw, individually and as widow of James M. Cleminshaw, and as Trustee ad litem for all persons entitled to share in the Estate of James M. Cleminshaw, deceased, respectfully moves for leave

to file a brief amicus curiae in the above captioned cause. The consent of all of the parties in the above captioned cause to the filing of a brief amicus curiae was sought. The attorneys for the Petitioners consented by letter dated November 4, 1958. The attorneys for the Respondent, Beech Aircraft Corporation, originally consented but subsequently withdrew this consent. The attorneys for the Respondent, Atlantic Aviation Corporation, refused to consent to the filing of such a brief.

Your Movant is the plaintiff and the Respondent Beech Aircraft Corporation is the defendant in Civil Action No. 1667 now pending in the United States District Court for the District of Delaware wherein your Movant (plaintiff therein) claimed damages for her decedent's wrongful death caused by Beech Aircraft Corporation's negligence in the manufacture of its airplane and its failure to warn prospective users of certain dangerous qualities and characteristics thereof.

Your Movant's decedent was killed December 4, 1953, while a passenger in Beecheraft Bonanza N2181D, as the result of a structural in-flight failure which occurred under circumstances similar to and in the immediate vicinity of but approximately three months after Petitioners' decedent's fatal tragedy. The Bonanzas involved in both tragedies were of the same year, type and model. Your Movant's decedent's plane, at the time of the structural in-flight failure, was being piloted by an experienced and duly licensed professional pilot rated to fly private and commercial, single and multiple engine aircraft visually and under instrument conditions. He also carried an instructor's license in these categories.

The Appellate Court's decision and opinion and the trial court's directed verdict are contrary to the Seventh Amendment to the Constitution and other decisions within and without the Third Circuit. If not reversed they will arbitrarily deprive your Movant as well as other plaintiffs under similar circumstances to a trial by jury as guaranteed by the Seventh Amendment to the Constitution.

Wherefore, it is respectfully requested that this Court grant your Movant leave to file herein a brief as amicus curiae.

Respectfully submitted.

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NOTICE OF MOTION

To: E. N. Carpenter, II
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and

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PLEASE TAKE NOTICE that on the 12th day of November, 1958, the undersigned will file the above Motion and accompanying Brief in the office of the Clerk of the Supreme Court of the United States, said

Motion to be considered at the convenience of the Court.

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INTEREST OF THE AMICUS CURIAE

Jean C. Cleminshaw is the widow of James M. Cleminshaw who was killed December 4, 1953 as the result of a structural in-flight failure of a Beechcraft Bonanza of the same type, model and year as that involved in the instant case. At the time of his death, James M.

Cleminshaw, the father of three children, was one of three passengers in a new Bonanza enroute from Columbus, Ohio, to Hartford, Connecticut. The plane was piloted by an experienced, professional pilot who was licensed to fly private and commercial, single and multiple engine aircraft under both visual and instrument flight conditions. The structural in-flight failure occurred in the vicinity of Harrisburg, Pennsylvania. All persons aboard were killed. If the Prashker Bonanza was the 46th Bonanza structural in-flight fatal accident (See Petitioners' Brief, p. 5), the Cleminshaw incident, which occurred three months after the Prashker fatality, was the 47th.

This Amicus Curiae filed Civil Action No. 1667 in the United States District Court for the District of Delaware against the Respondent Beech Aircraft Corporation wherein she claimed damages for her decedent's wrongful death caused by said Respondent's negligence in the manufacture of its airplane and its failure to warn prospective users of the dangerous characteristics and qualities thereof. Civil Action No. 1667 is presently pending and awaiting the final determination of the instant cause.

The affirmance by the Third Circuit Court of Appeals of the trial court's directed verdict on grounds set forth in its opinion—if not reversed by this Court—will automatically deprive this Amicus Curiae and any other plaintiff who questions the design and dangerous characteristics (known to the manufacturer but unknown to the user) of an aircraft to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

ARGUMENT

The decisions below are contrary to the Seventh Amendment to the Constitution of the United States which says:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Those decisions are contrary to the Seventh Amendment because the courts below determined factual issues which should have been relegated solely to the jury. This deprived the Petitioners, and will deprive other plaintiffs in the same situation, of their constitutional right to trial by jury.

The Appellate Court recognized its constitutional limitation, and the limitation of the trial court, on the question of *contributory negligence* when it said:

> "A decision based on Prashker's contributory negligence alone would depend on a preliminary holding that the evidence would not support an inference that bad weather may have closed in on him even though he was exercising due care for his own safety. We incline to the view that no such inference is available, but concede that *the question may be arguable.*" (Italics supplied) (258 F. 2d 602; 606; Appendix 7a of Petitioners' Brief)

But on the question of *primary negligence*—even though the same constitutional limitation was applicable; even though the Seventh Amendment, on the evidence adduced, required a jury determination thereof—it cast aside this constitutional restriction and arbi-

trarily decided ". . . no negligence can be imputed to the defendants." (258 F. 2d 602, 606; Appendix 7a of Petitioners' Brief) In order that it might reach this arbitrary conclusion the Appellate Court, contrary to the Constitution, determined the following factual issues in the following manner:

1. Was the Bonanza improperly designed because

A. The model is subject to a lateral oscillation of some two or three degrees on either side of a norm in rough air flight, and that this oscillation induces vertigo whenever visual references become unavailable?

The Appellate Court (258 F. 2d 602, 606; Appendix 7a of Petitioners' Brief) answered that factual question NO because "any aircraft under similar flight conditions is subject to *some* lateral oscillation." (Italics supplied)

The evidence adduced warranted a jury—not a court—determination.

B. The plane tended to assume a nose-down attitude and once in that position accelerated dangerously?

The Appellate Court (258 F. 2d 602, 606; Appendix 7a of Petitioners' Brief) answered that factual question NO because "any airplane certificated by the C.A.A. as was the Bonanza must be statistically stable."

Certification by C.A.A. does not give absolution to the manufacturer on all questions of negligence. C.A.A. regulations set the minimum requirements. They do not determine the standard of care.

C. It should have been equipped with dive brakes?

The Appellate Court (258 F. 2d 602, 606; Appendix 8a of Petitioners' Brief) answered that

factual question NO because "Beech had in fact considered the use of dive-brakes but had abandoned the idea largely because much the same result could be achieved by extending the landing gear."

Much the same result could not be achieved by extending the landing gear because extension of the landing gear at high speeds would—of itself—cause a structural failure. The Beech Aircraft Corporation Bonanza Manual (plaintiffs' Exhibit 18 in the trial court) states specifically that the maximum safe speed for extension of the landing gear is 125 mph. This is repeated at page 59 of the Beechcraft Bonanza 1953 Handbook (plaintiffs' Exhibit 17 in the trial court).

D. The stick-loads were dangerously light?

The Appellate Court (258 F. 2d 602, 606; Appendix 8a of Petitioners' Brief) answered that factual question NO by saying "the Bonanza's stick-loads exceeded those imposed by the military for their aircraft designed to perform more violent maneuvers than is the Bonanza."

The safety requirements for military and civilian aircraft are not comparable and compliance by one with the minimum requirements set by the other does not necessarily satisfy the standard of care required.

2. Was there a duty on the part of Beech to warn of the Bonanza's dangerous characteristics?

The Appellate Court (258 F. 2d 606, 607; Appendix 8a of Petitioners' Brief) answered that factual question NO because "Even if it can be said that there was a duty to warn of the dangers in exceeding the inherent restrictions in any aircraft, that duty was adequately discharged by the warnings to avoid instrument flight conditions.

which would be the only anticipatable way the restrictions could be unintentionally exceeded by a pilot."

"Beech has never, but probably should have, publicized its Bonanza as a VFR or "fair weather" plane only. Although Prashker did not have an instrument rating, the pilot in the Cleminshaw tragedy was a professional pilot with more than 2100 hours of pilot experience. He was licensed to fly commercial as well as private aircraft and he had an instrument rating. A substantial number of the pilots in the 46 (as of the date of the Prashker tragedy and 79 as of December 31, 1957[1]) fatal structural in-flight Bonanza failures were instrument rated pilots. Were they, too, supposed to avoid instrument flight conditions? If they were, there was no evidence anywhere of such warning by Beech.

Each and every one of the foregoing determinations by the court was based on factual issues. The questions involved were such that, based on the evidence, reasonable men might arrive at differing answers. Under the Constitution, the decided cases of this Court, other circuit courts of appeals and prior decisions within the same circuit, those factual issues should have been determined by the jury.

Schulz v. *Pennsylvania R. Co.*, 350 U.S. 523; 100 L. Ed. 668.

Thomas v. *Conemaugh & Black Lick Railroad Company* (1956, 3rd C.C.A.) 234 F. 2d 429, 432.

Doggett v. *Atlantic Holding Corporation* (1956, 4th C.C.A.) 239 F. 2d 156, 159.

North American Aviation, Inc. v. *Hughes* (1957, 9th C.C.A.) 247 F. 2d 517; cert. den. 355 U.S. 914; 2 L. Ed. 2d 273.

[1] Petitioners' Brief, p. 3, footnote 1.

CONCLUSION

So that the Constitution and the right to trial by jury thereunder shall be preserved, this Court should grant the Petitioners' writ and eventually reverse the Appellate Court.

Respectfully submitted,

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